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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1965

No. 1180

ROBERT A. MILLER, *Petitioner*,

v.

B. J. RHAY, as Superintendent of the Washington State Penitentiary, *Respondent*.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS, OR, IN THE ALTERNATIVE, FOR REMAND TO COURT BELOW FOR RECONSIDERATION AND FURTHER APPROPRIATE PROCEEDINGS AND MEMORANDUM OF RESPONDENT IN SUPPORT OF MOTION.

JOHN J. O'CONNELL,
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STATE PRINTING PLANT, OLYMPIA, WASH.

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IN THE

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MOTION TO DISMISS, OR, IN THE ALTERNATIVE; FOR REMAND TO COURT BELOW FOR RECONSIDERATION AND FURTHER APPROPRIATE PROCEEDINGS.

TO: THE HONORABLE EARL WARREN, CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

The respondent, B. J. RHAY, Superintendent of the Washington State Penitentiary at Walla Walla, Washington, by and through his attorneys, JOHN J. O'CONNELL, Attorney General of the State of Washington and STEPHEN C. WAY, Assistant Attorney

General, moves the court to dismiss the writ of certiorari previously granted in this cause, or in the alternative, to remand this case to the court below for further appropriate proceedings, on the grounds:

I

That since the decision made by the Supreme Court of the State of Washington, in the petitioner's cause before that court on June 16, 1965, and, shortly following the granting of certiorari by this court to review the decision of the Supreme Court of Washington, the latter court, on April 28, 1966, in the case of *Dillenburg v. Maxwell*, 68 Wash. Dec. 2d, (No. 11) 481, ——P.2d —— (see Appendix A.) reversed its position upon the issues decided in the petitioner's case, and which would entitle the petitioner herein, to substantially the relief which is sought before this court if this matter were remanded to the Supreme Court of the State of Washington for further proceedings consistent with its opinion in *Dillenburg v. Maxwell, supra* (App. A.).

II

That the supervening change in the law of the State of Washington (*Dillenburg v. Maxwell, supra* (App. A.)) favorable to the contentions of petitioner upon the issues presented to this court, renders the federal questions unsubstantial and the "special and important reasons" for granting the writ of certiorari pursuant to Supreme Court Rule 19 without substance, the *Dillenburg* decision, *supra*, making

the law of Washington consistent with this court's decision in *Kent v. United States*, 383 U.S. ——, 16 L. Ed. 2d 84, 86 S. Ct. 1045.

WHEREFORE, the respondent respectfully prays the court to grant the respondent's motion to dismiss the writ of certiorari in this cause, or, in the alternative, remand this case to the Supreme Court of the State of Washington for further appropriate proceedings in light of its decision in *Dillenburg v. Maxwell, supra.*

JOHN J. O'CONNELL,
Attorney General of the State of Washington,

STEPHEN C. WAY,
Assistant Attorney General,

Attorneys for the Respondent.

MEMORANDUM OF RESPONDENT IN SUPPORT OF MOTION TO DISMISS

I

OPINION BELOW

The petitioner's case before the Supreme Court of the State of Washington was decided by an Order of the court denying the petitioner's application for a writ of habeas corpus. (App. B.), rather than by the court's written Opinion, which is permitted by Rule 56 (7) of the Rules of the Supreme Court of the State of Washington pertaining to habeas corpus proceedings.

The material portion of the Order of the Supreme Court denying the application of the petitioner herein for a writ of habeas corpus is quoted below:

> "This matter came on regularly for hearing before Department No. II of this court on June 11, 1965; the petitioner, ROBERT A. MILLER, acting pro se and the respondent being represented by STEPHEN C. WAY, Assistant Attorney General; and the court having read and considered the application of ROBERT A. MILLER for a writ of habeas corpus, and the respondent's return and answer and the attachments thereto, and it appearing that the application for a writ of habeas corpus and the return and answer, give rise to the following:

ISSUES

1. Whether or not the Superior Court of the State of Washington for King County acquired jurisdiction over the person of the petitioner upon the charge of Taking a Motor Vehicle Without The Permission of the Owner as contained in the Information, at such time the petitioner being 16 years of age.
2. Whether or not the petitioner was unlawfully held in custody and confinement in the King County Jail from the time of his arrest on December 6, 1957, until the entry of judgment and sentence during all of which time the petitioner was a minor of the age of 16 years.
3. Whether or not the petitioner was unlawfully fingergrinted and photographed while held in custody in the King County Jail.

This court having considered the application of ROBERT A. MILLER for a writ of habeas corpus; the return and answer of the respondent and the attachments thereto, the memorandum of the petitioner in support of his application for a writ of habeas corpus and the memorandum brief of the respondent, and having heard the oral argument by counsel for the respondent, STEPHEN C. WAY, Assistant Attorney General, and the court being fully advised in the premises, makes the following:

CONCLUSIONS

1. That on December 9, 1957, the Juvenile Department of the Superior Court of the State of Washington for King County entered an Order in Cause No. 25936 in accordance with the provisions of RCW 13.04.120 refusing to entertain jurisdiction of the petitioner and remanding him to the prosecuting attorney of King County for the taking of such action under the criminal laws of the State of Washington as he might deem to be appropriate; and such order further authorizing the holding of the petitioner in confinement in the city jail of Seattle, or the county jail of King County, and authorizing the taking of photographs and fingerprints of the petitioner. That at the time of the entry of such order refusing jurisdiction by the juvenile court, the criminal department of the Superior Court of the State of Washington for King County acquired jurisdiction of the person of the petitioner and any and all defects in the nature of the custody of the petitioner, and the taking of his photograph and fingerprints, were cured by the entry of such order by the juvenile court refusing jurisdiction.

IT IS HEREBY ORDERED that the application of ROBERT A. MILLER for a writ of habeas cor-

pus be, and the same is hereby denied and the proceedings dismissed.

Done in the Chambers of the Chief Justice this 16th day of June 1965.

/s/ HUGH ROSELLINI,
Chief Justice"

The issues, as to whether or not the constitutional rights of the petitioner, in this cause, to "due process of law", "equal protection of the law", and, "to enjoy the aid and assistance of counsel for his defense", were violated when the Juvenile Court for King County declined to entertain jurisdiction over the petitioner, under the Juvenile Code (Chap. 13.04 RCW), and, remanded the petitioner for prosecution under the Criminal Code, were decided on April 28, 1966 by the Supreme Court of the State of Washington, favorably, to the petitioner's contentions in the cause before this court.

In the decision by the Supreme Court of the State of Washington in *Dillenburg v. Maxwell, supra* (App. A. pp. 47-50) the court stated in part as follows:

"* * * The recent opinion of the United States Supreme Court (filed March 21, 1966) concerning the District of Columbia statute relating to the juvenile court is a complete answer to the *Stevenson* case, *supra*, and the Attorney General's argument that only an investigation is needed. In *Kent v. United States*, 383 U.S. ——, 16 L. Ed. 2d 84, 86 S.Ct. 1045 (1966), the juvenile court judge surrendered the jurisdiction of the juvenile court after a

'full investigation' but without holding any hearing. He made no findings and gave no reason for the waiver. Petitioner Kent had a substantial prior juvenile court record. In holding that the juvenile court had denied to petitioner Kent the basic requirements of due process under the District of Columbia Juvenile Court Act, the United States Supreme Court, in the majority opinion, states:

> 'We agree that the order of the Juvenile Court waiving its jurisdiction and transferring petition for trial in the United States District Court for the District of Columbia was invalid. There is no question that the order is reviewable on motion to dismiss the indictment in the District Court, as specified by the Court of Appeals in this case. *Kent v. Reid, supra* (316 F.2d 331 (D.C. Cir. 1963)). The issue is the standards to be applied upon such review.
>
> We agree with the court of appeals that the statute contemplates that the juvenile court should have considerable latitude within which to determine whether it should retain jurisdiction over a child or—subject to the statutory delimitation—should waive jurisdiction. But this latitude is not complete. At the outset, it assumes procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness, as well as compliance with the statutory requirement of a "full investigation." *Green v. United States*, 308 F.2d 303 (C.A.D.C. Cir. 1962). The statute gives the juvenile court

a substantial degree of discretion as to the factual considerations to be considered, the weight to be given them and the conclusion to be reached. It does not confer upon the juvenile court a license for arbitrary procedure. The statute does not permit the juvenile court to determine in isolation and without the participation or any representation of the child the "critically important" question of whether a child will be deprived of the special protections and provisions of the Juvenile Court Act. It does not authorize the juvenile court, in total disregard of a motion for hearing filed by counsel, and without any hearing or statement or reasons, to decide—as in this case—that the child will be taken from the Receiving Home for Children and transferred to jail along with adults; and that he will be exposed to the possibility of a death sentence instead of treatment for a maximum, in Kent's case, of five years, until he is 21.

We do not consider whether, on the merits, Kent should have been transferred; but there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons. It is inconceivable that a court of justice dealing with adults, with respect to a similar issue, would proceed in this manner. It would be extraordinary if society's special concern for children, as reflected in the District of Columbia's Juvenile Court Act, per-

> mitted this procedure. We hold that it does not.' (Footnotes omitted)
>
> "In our opinion, this decision is conclusive of the issue in this case of whether a judicial hearing is required by our statute in order to fulfill the procedural requirements of due process.
>
> For the reasons stated herein, we must hold that the purported order entitled, 'Surrender of Jurisdiction' (quoted above) was null and void, and hence the superior court, in accepting petitioner's plea of guilty and entering its judgment and sentence, was acting without legal authority."

It would appear that one of the controlling factors governing the jurisdiction of this court to review by certiorari the decision of the highest court of a state is that a federal question of substance is presented which has been decided by the state court in a manner, probably not in accord with applicable decisions of this court. (Rule 19, Supreme Court Rules)

It would seem clear beyond question that the issues tendered to this court by the petitioner, ROBERT A. MILLER, in his application to this court for a writ of certiorari, have now become moot for the reason that the Supreme Court of the State of Washington, in its recent decision in *Dillenburg v. Maxwell* (App. A.) has decided the constitutional questions in a manner entirely consistent with this court's recent decision in *Kent v. United States*, 383 U.S. ——, 16 L. Ed. 2d 84, 86 S.Ct. 1045. Therefore, there is, at

this time, a lack of a substantial federal question in the petitioner's case before this court, the issues having been rendered moot and further proceedings herein have become unnecessary.

III

STATUTE INVOLVED

The statute of the State of Washington under the authority of which the petitioner herein, ROBERT A. MILLER, was remanded from the juvenile court to the Superior Court for prosecution under the Criminal Code is RCW 13.04.120 which provided at that time as follows:

> "When, in any county where a juvenile court is held, a child under the age of eighteen years is taken into custody by a parole, peace, police or probation officer, such child shall be taken directly before such court, or placed in the detention home or placed under the jurisdiction of such court, or into the custody of the court probation officer: *Provided*, That if the parent, guardian, custodian or a responsible relative of the child furnishes the officer a signed statement agreeing to produce the child at the next juvenile court session, the child may be released to the signer of the statement. Any such signer who fails, without just cause shown to the court, to produce such child as agreed, shall be guilty of contempt of court and may be punished accordingly.
>
> The court may proceed to hear and dispose of the case in the same manner as if the child had been brought before the court upon petition as

hereinbefore provided. In any such case, the court shall require a notice to be given and investigation to be made as in other cases under this chapter, and may adjourn the hearing from time to time for such purpose. Pending final disposition of the case the court may make such disposition of the custody of the child as it shall deem for the best welfare of the child. If, upon investigation, it shall appear that a child has been arrested upon the charge of having committed a crime, the court, in its discretion, may order such child to be turned over to the proper officers for trial under the provisions of the criminal code.

Nothing in this section shall be construed as forbidding any peace officer, police officer or probation officer from immediately taking into custody, without process, any child who is found violating any law or ordinance, or who is reasonably believed to be a fugitive from his parents or from justice, or whose surroundings are such as to endanger his health, morals or welfare, unless immediate action is taken. In every such case, the officer taking the child into custody shall immediately report the fact to the juvenile court and the case shall then be proceeded with as provided in this chapter."

IV

QUESTIONS PRESENTED

The question presented by the application for a writ of certiorari is whether the petitioner, on December 9, 1957, when he was then of the age of sixteen years, was denied "due process", when the juvenile court for King County, State of Washington, entered its order in the petitioner's case, declining to entertain its exclusive jurisdiction (RCW 13.04.010) over all juveniles under 18 years of age and remanding the petitioner for prosecution under the Criminal Code, without prior notice of the pending determination, without hearing, or effective representation by counsel upon the question.

The issue arising from the respondent's motion is whether this court should further retain jurisdiction in this case and proceed to the resolution and disposition of the issues in light of the present posture of the law of the State of Washington upon the question presented. Or, should the case be remanded to the Supreme Court of the State of Washington for further consideration and appropriate proceedings in light of the decision of the Supreme Court of the State of Washington in *Dillenburg v. Maxwell, supra,* (App. A.) which resolves the issues presented by the petitioner and makes the law of Washington upon the issues substantially the same and consistent with this court's decision in *Kent v. United States, supra.*

STATEMENT OF THE CASE

On December 7, 1957, the petitioner, ROBERT A. MILLER, along with a person named BYRON CARPENTER, were arrested in the City of Seattle, near the University District upon the charge of TAKING A MOTOR VEHICLE WITHOUT THE PERMISSION OF THE OWNER, a felony. (RCW 9.54.020) The petitioner and his confederate were taken by the Seattle Police Officers to the County Jail where they were placed in custody.

Shortly following the arrest of the petitioner, the matter was referred to the Juvenile Department of the Superior Court for King County by the Seattle Police Department for the petitioner was then, only sixteen years of age. In Washington, as well as in many other states, children under the age of eighteen years who are either delinquent or dependent, are subject to the exclusive jurisdiction of the juvenile court. (RCW 13.04.010)

On December 9, 1957, without notice or hearing, the Juvenile Department of the Superior Court for King County entered its order declining to entertain jurisdiction of the petitioner under the provisions of the Juvenile Court Act and pursuant to the authority of RCW 13.04.120. The order declining to exercise jurisdiction provides, insofar as pertinent, as follows:

> "After reviewing the facts and circumstances of the case involving the above-named juvenile,

as they now appear, the juvenile court refuses to accept jurisdiction; and it is further ordered that such photographs and fingerprints of the said child may be taken as are deemed advisable by the criminal authorities; and the said child is hereby referred to the prosecuting attorney of King County, Washington;

IT IS FURTHER ORDERED that said child may be placed in the City Jail at Seattle, Washington, or the County Jail of King County, Washington, as may be directed by the law enforcement authorities.

/s/ WILLIAM B. LONG,
Superior Court Judge"

On January 10, 1958, the Prosecuting Attorney for King County filed an Information in the Superior Court for King County charging the petitioner, ROBERT ALLAN MILLER, and one, BYRON WILLIAM CARPENTER, with the crime of TAKING A MOTOR VEHICLE WITHOUT THE PERMISSION OF THE OWNER, a felony. (RCW 9.54.020) Shortly following the filing of the Information by the Prosecuting Attorney, the Superior Court appointed Mr. James B. Wilson, a capable and experienced attorney, to represent the petitioner and give aid and assistance in his defense.

On February 7, 1958, the petitioner, ROBERT ALLAN MILLER, along with his court-appointed lawyer, Mr. James B. Wilson, came before the Superior Court for King County for arraignment and the taking of the petitioner's plea to the charges as contained in the Information. At that time, the petitioner entered a plea of "Guilty" of the offense charged in the

Information. Thereafter, the petitioner was sentenced by the trial court to a term of confinement of not more than ten years. Judgment and sentence was formally approved by the court on March 21, 1958.

On December 9, 1957, at the time that the Juvenile Court for King County declined to entertain jurisdiction over the petitioner, it found that the facilities and services available to the Juvenile Court could be of no further benefit to the petitioner, ROBERT ALLAN MILLER. This finding would appear to stem from the fact that the petitioner had been before that court on numerous prior occasions for delinquencies ranging from four prior auto thefts, three larcenies combined with shoplifting and drinking, run-away, escape from a juvenile correctional institution and assault upon a 65 year old man. The latter occurrence resulted in a declination of jurisdiction by the juvenile court resulting in a ten-day jail sentence by the justice court.

The petitioner was admitted to Washington State Reformatory on his present conviction on April 1, 1958 and was transferred to the Washington State Penitentiary on October 12, 1960, and since his being received at the state reformatory, he has incurred approximately 75 rule-infraction reports while in custody. As a result, the minimum time which he is required to serve has been repeatedly increased by the Board of Prison Terms and Paroles due to his incorrigibility. The petitioner's maximum term of

confinement will expire in something less than two years, the date being March 20, 1968.

Although the facts in the two preceding paragraphs have no bearing whatsoever upon the issues of law in this case, they are set forth herein in order that the court may have a more complete understanding of this case.

ARGUMENT IN SUPPORT OF MOTION

A. Lack of Substantiality and Necessity for Adjudication of the Federal Question.

The law of Washington concerning the issue of this case, i.e., Due Process Considerations, of Declination of Juvenile Court Jurisdiction and Remand for Criminal Trial without Notice or Hearing, has undergone drastic change rendering the federal question presented unsubstantial and lacking the requisite "special and important reasons" for the decision of the federal question. (Supreme Court Rule 19)

It is clear beyond doubt, that the Supreme Court of Washington in its opinion in *Dillenburg v. Maxwell*, 68 Wash. Dec. 2d (No. 11) 481, —— P.2d— (App. A. pp. 47-50) has made the standards laid down by this court in *Kent v. United States*, *supra*, the governing principles for the courts of Washington, in all cases of juveniles where the issue arises concerning the assumption or refusal to entertain exclusive jurisdiction under the Juvenile Court Act. (Chapter 13.04 RCW)

In *Dillenburg v. Maxwell, supra* (App. A., pp. 47-50) the Supreme Court of the State of Washington discusses at length the case of *Kent v. United States, supra,* and we submit adopts the standards laid down there as applicable to the procedures in Washington. The court stated in part:

> "The recent opinion of the United States Supreme Court (filed March 21, 1966) concerning the District of Columbia statute relating to the juvenile court is a complete answer to the *Stevenson* case, *supra,* and the Attorney General's argument that only an investigation is needed. In *Kent v. United States,* —— U.S. ——, —L. Ed.——, —— S.Ct. ——(1966), the juvenile court judge surrendered the jurisdiction of the juvenile court after a 'full investigation' but without holding any hearing. He made no findings and gave no reason for the waiver. Petitioner Kent had a substantial prior juvenile court record. In holding that the juvenile court had denied to petitioner Kent the basic requirements of due process under the District of Columbia Juvenile Court Act, the United States Supreme Court, in the majority opinion, states:
>
> > 'We agree that the order of the Juvenile Court waiving its jurisdiction and transferring petition for trial in the United States District Court for the District of Columbia was invalid. There is no question that the order is reviewable on motion to dismiss the indictment in the District Court, as specified by the Court of Appeals in this case. *Kent v. Reid, supra,* (316 F.2d 331 (D.C. Cir. 1963)). The issue is

the standards to be applied upon such review.

We agree with the court of appeals that the statute contemplates that the juvenile court should have considerable latitude within which to determine whether it should retain jurisdiction over a child or—subject to the statutory delimitation—should waive jurisdiction. But this latitude is not complete. At the outset, it assumes procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness, as well as compliance with the statutory requirement of a "full investigation". *Green v. United States*, 308 F.2d 303 (C.A.D.C. Cir. 1962). The statute gives the juvenile court a substantial degree of discretion as to the factual considerations to be considered, the weight to be given them and the conclusion to be reached. It does not confer upon the juvenile court a license for arbitrary procedure. The statute does not permit the juvenile court to determine in isolation and without the participation or any representation of the child the "critically important" question of whether a child will be deprived of the special protections and provisions of the Juvenile Court Act. It does not authorize the Juvenile Court, in total disregard of a motion for hearing filed by counsel, and without any hearing or statement or reasons, to decide—as in this case—that the child will be taken from the Receiving

> Home for Children and transferred to jail along with adults; and that he will be exposed to the possibility of a death sentence instead of treatment for a maximum, in Kent's case, of five years, until he is 21.
>
> We do not consider whether, on the merits, Kent should have been transferred; but there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons. It is inconceivable that a court of justice dealing with adults, with respect to a similar issue, would proceed in this manner. It would be extraordinary if society's special concern for children, as reflected in the District of Columbia's Juvenile Court Act, permitted this procedure. We hold that it does not.' (Footnotes omitted)

"*In our opinion, this decision is conclusive of the issue in this case of whether a judicial hearing is required by our statute in order to fulfill the procedural requirements of due process.*" (Emphasis supplied)

We respectfully submit that since the decision by the Supreme Court of the State of Washington in the case of *Dillenburg v. Maxwell, supra*, the "special and important reasons" for the granting of the writ of certiorari in this case, pursuant to Rule 19 have substantially diminished.

In *Rice v. Sioux City Cemetery*, 349 U.S. 70, 99 L.Ed 897, 75 S.Ct. 614, at p. 73, a similar situa-

tion was before this court, and in commenting upon the problem, stated in part, as follows:

> "In our consideration of this petition our attention has now been focused upon an Iowa statute enacted since the commencement of this litigation. Though it was in existence at the time the case first came here, it was then not seen in proper focus because blanketed by the issues of 'state action' and constitutional power for which our interest was enlisted. This Iowa statute bars the ultimate question presented in this case from again arising in that state. In light of this fact and the standards governing the exercise of our discretionary power of review upon writ of certiorari, we have considered anew whether this case is one in which 'there are special and important reasons' for granting the writ of certiorari, as required by Supreme Court Rule 19.
>
> This Rule, formulated 30 years ago, embodies the criteria, developed ever since the Evarts Act of 1891, by which the court determines whether a particular case merits consideration, with due regard to the proper functioning of the limited reviewing power to which this court is confined, decisively restricted through the creation of the intermediate courts of appeals and more largely confined by the Judiciary Act of 1925. In illustrating the character of reasons which may be deemed 'special and important,' the Rule refers to cases.
>
> > 'Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it

in a way probably not in accord with applicable decisions of this court.'

"A federal question raised by a petitioner may be 'of a substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. * * *"

" 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the court's duty to avoid decision of constitutional issues unless avoidance becomes evasion."

Although, the order of the Supreme Court of the State of Washington denying the petitioner's application for a writ of habeas corpus was no doubt, at least in part, the motivating factor for this court to find the 'special and important reasons' for granting the writ of certiorari in this case. Since the supervening change in the law of the State of Washington, as reflected by *Dillenburg v. Maxwell, supra*, we respectfully submit that these 'special and important reasons' have dissipated and rendered the issues academic insofar as the law of Washington is concerned. Further, the decision by the Supreme Court of the State of Washington in Dillenburg has rendered the federal question in this case unsubstantial and has made Washington Law 'in accord with applicable decisions of this court'.

Accordingly, the writ of certiorari, for these reasons, should be dismissed, or, in the alternative, the case remanded to the Supreme Court of the State of Washington for reconsideration.

B. Remand to Court Below by Reason of Supervening Change of Law.

The procedure sought by the respondent, by its motion for the dispostion of this case, is neither novel nor unique, and there are numerous instances in the history of this court in which cases have been remanded to the court below for reconsideration in view of supervening changes in either the law or facts pertinent to such cases. One of the most recent of these cases is *Bell v. Maryland*, 378 U.S. 226, 237, 12 L.Ed.2d, 822, 830, 84 S.Ct. 1814 and the reasoning there seems equally applicable to this case. There the court stated in part as follows:

> "* * * Nor is it for us to ignore the supervening change in state law and proceed to decide the federal constitutional questions presented by this case. To do so would be to decide questions which, because of the possibility that the state court would now reverse the convictions, are not necessarily presented for decision. Such a course would be inconsistent with our constitutional inability to render advisory opinions, and with our consequent policy of refusing to decide a federal question in a case that might be controlled by a state ground of decision. See *Murdock v. Memphis*, 20 Wall, 590, 634-636, 22 L.Ed. 429, 443, 444. To avoid these pitfalls—to let issues of state law be de-

> cided by state courts and to preserve our policy of avoiding gratuitous decisions of federal questions—we have long followed a uniform practice where a supervening event raises the question of state law pertaining to a case pending on review here. That practice is to vacate and reverse the judgment and remand the case to the state court, so that it may reconsider it in the light of the supervening change in state law."

Also, in *Young v. Ragen*, 337 U.S. 235, 93 L.Ed. 1333, 69 S.Ct. 1073, which was a habeas corpus proceeding and bears some similarity to the case at bar, this court vacated the order denying the writ of habeas corpus and remanded to the court below for reconsideration. That result seemed to have been dictated due to a probable supervening change in the law of the State of Illinois, resulting from a decision of the Illinois Supreme Court.

We suggest, that the Doctrine of Comity is also applicable to the circumstances under which this case stands before the court. We recognize that the Doctrine of Comity is not a rule of law, but a matter of custom or practice where, in appropriate circumstances, one court will defer to the jurisdiction of the other. The exercise of the Doctrine of Comity, generally speaking, is not imperative, but, more a matter of courtesy. However, it has substantial value in obtaining uniformity of decision and discouraging repeated litigation of the same question. It has especial value in preventing conflicts between

our dual judicial systems. *Elkins v. United States*, 364 U.S. 206, 4 L.Ed.2d 1680, 80 S.Ct. 1437; *Wilson v. Schnettler*, 365 U.S. 381, 5 L.Ed.2d, 620, 81 S.Ct. 632; *Mapp v. Ohio*, 367 U.S. 643, 6 L.Ed.2d, 1081, 81 S.Ct. 1684.

C. Considerations of Expediency in the Attainment of Relief for Petitioner.

Doubtless, if this case remains in its present posture upon the docket of this court, it will not be reached for argument until the next term of court, and then, perhaps, not until late this year or early in the year 1967. An opinion of the court under these circumstances, probably, would not be rendered, at least, until ninety days following the argument of counsel before the court. Following the court's opinion, the case then must be remitted to the Supreme Court of the State of Washington for appropriate proceedings consistent with the opinion which would require further consumption of time before the petitioner would actually enjoy relief.

On the other hand, if this court granted the respondent's motion and remanded this case to the Supreme Court of the State of Washington for reconsideration, relief could far more promptly be accorded to the petitioner in the same manner as was done in *Dillenburg v. Maxwell.*

CONCLUSION

WHEREFORE, the respondent, for the reasons herein set forth, prays the court to grant the respondent's motion to dismiss the writ of certiorari, or, in the alternative, to vacate the order of the Supreme Court of the State of Washington denying the writ of habeas corpus and remand the case for reconsideration in the light of the decision in *Dillenburg v. Maxwell.*

Respectfully submitted,

JOHN J. O'CONNELL,
Attorney General of the State of Washington,

STEPHEN C. WAY,
Assistant Attorney General.

APPENDIX A.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Application for a Writ of Habeas Corpus of BYRLE L. DILLENBURG, *Petitioner*, vs. ROGER F. MAXWELL, Superintendent of the Washington State Reformatory at Monroe, Washington, *Respondent*.	No. 38273 DEPARTMENT TWO Filed April 28, 1966

This is an appeal from an order entered by the Superior Court for Jefferson County denying petitioner's "Application Petition for a Writ of Habeas Corpus" and dismissing the proceeding after a hearing on the merits.

The petitioner, Byrle L. Dillenburg (also known as Larry Priest) prosecuted his petition in forma pauperis and acted as his own attorney in the preparation of his petition and two briefs filed in this court and in the examination and cross-examination of witnesses at the hearing in the trial court.[1]

Petitioner originally filed his petition in the Superior Court for Snohomish County because he

[1]At the beginning of its oral opinion, the trial court observed: "The Court: Well, since the petitioner here, Byrle Laird Dillenburg, is a young man, I will be more specific in my conclusions and opinions than I might otherwise. First, I want to compliment him on the excellent presentation of his problem in the court today. There are few that I know who could, with as little training as he has had, handle it as well."

was then confined in the Washington State Reformatory, which is located therein. Respondent is the superintendent thereof. After a brief hearing, that court, with the petitioner's consent, transferred the case to the Superior Court for Jefferson County.

In his petition, petitioner alleged 10 separate grounds for relief. In view of the conclusion we have reached after a study of the entire record, we need discuss only petitioner's ground (No. 9) that the order surrendering the jurisdiction of the juvenile court was void because it was not signed by a judge of the superior court. Respondent, who was represented by an assistant attorney general and the prosecuting attorney for Jefferson County, claims to have first raised this question at the hearings before the superior courts of Snohomish and Jefferson counties. In any event, both parties recognized the importance of this issue of law. So did the trial court, which held that the order (which was signed only by the chief probation officer) was valid to give the superior court jurisdiction of petitioner. The portions of the record bearing on this vital question will be discussed at some length later in this opinion.

Petitioner was born July 6, 1946. At all times material to the present proceeding, he was residing with his parents at Discovery Bay, Washington. On September 13, 1962, his mother called the sheriff's office and reported that he was a runaway. On September 20, 1962, at about 9 a.m., a resident of Brinnon, Washington, called the sheriff's office stating

that three boys had pilfered a campsite near his place of business (the Rainbow Lodge) and that he thought one of them was petitioner. A deputy sheriff was dispatched to that area, and, after searching for petitioner all day, he finally located him on Highway 101 about half a mile south of Quilcene and arrested him between 5 and 6 p.m. He brought petitioner to Port Townsend and placed him in the county jail as a juvenile delinquent.

Just prior to petitioner's arrest he either had been driving, or had been an occupant of, an old car with an Oregon license. Two other boys were with him. When the deputy sheriff approached the car (which was then stopped in a private driveway), all three occupants fled into the brush in an attempt to escape from the officer. It later developed that this car was reported as stolen in the Washington Stolen Car Bulletin.

September 25, 1962, the chief probation officer, after conferring with petitioner and later with Judge Church, who was then the judge of the superior courts for Clallam and Jefferson counties, signed the following order entitled "Surrender of Jurisdiction."

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF CLALLAM [Crossed out by pen] JEFFERSON [Inserted by pen]

JUVENILE DIVISION

IN THE MATTER OF THE WELFARE OF LARRY PRIEST, a minor, whose true name is Byrle Laird Dillenburg Born 7-6-46.	No. J—529 SURRENDER OF JURISDICTION

The Court having considered the nature and gravity of the charges preferred against the above named minor and the facts and circumstances said to be involved,

IT IS HEREBY DECLARED, that the Juvenile Court refuses to accept and does now surrender jurisdiction of said minor,

IT IS THEREFORE ORDERED that said minor may be placed and held (pending further order herein by the Court) in such jail or other secure place as the circumstances warrant and as directed by the said officers.

DONE this 25 day of September, 1962, at Port Angeles, Washington.

H. T. ROGERS,

Judge [Crossed out by pen]
Chief Probation Officer. [Inserted by Typing]

The chief probation officer testified that petitioner was not given any formal hearing in the juvenile court after his arrest. The record shows that petitioner had been before the juvenile court on at

least two previous occasions—in September, 1959, and in January, 1960. He had been committed at one time to the Luther Burbank School and at another time to the Fort Worden Diagnostic Center.

As to his purpose in interviewing petitioner in jail a few days after his arrest, the officer testified:

> Q. Did you see the petitioner here on the 24th? A. I don't know whether I saw Larry in person on the 24th or not. I did talk to him and visit him in the jail a time or so while this was going on under juvenile jurisdiction. Q. What was the purpose of the visits? A. To talk to Larry, to get an idea of his attitude, and to make some decision as to whether the Juvenile Court could help this youngster. Q. Did Larry advise you that he had made a statement to the sheriff? A. I probably had a copy of the statement. Normally a copy of the statement is furnished to me with the officer's report. This is normal procedure, a copy of the officer's report and a copy of the statement, if any is taken. Q. And of course, during the time or times you visited him he was still being handled as a juvenile? A. Right. Q. And was one of the purposes of the visits and the studying of the report to make some decision in your mind as to whether it was a proper case for the Juvenile Court? A. Well, my prime concern here, as I recall there was no question so far as the Juvenile Court was concerned, as far as guilty or not guilty. It wasn't contested. But my objective was to talk to Larry and going over this report and trying to arrive at some decision or recommendations in order to give to Judge Church on

what procedure to follow in using the Juvenile Court. In other words, to assess Larry's attitude and his feeling about himself, and what his chances of rehabilitation was. Q. And did you make such a recommendation? A. Yes. Q. What was that recommendation? A. I recommended to Judge Church Juvenile Court jurisdiction be waived and he be tried as an adult.

He further testified as to his authority to sign the above quoted order as follows:

Q. Had you signed documents similar to this in other cases? A. Yes. Q. Surrendering or referring jurisdiction over to the criminal court? A. Yes. But let me explain here that this was in compliance with policies that Judge Church had directed me to follow. I never signed one of these forms—if you will notice, that is a form order made out for Clallam County, the Clallam is knocked out and Jefferson is inserted, it is filled in in long hand—any time there was a juvenile situation came up where there was the possibility of waiver of jurisdiction, I always discussed this in person with Judge Church, and I never signed one of those unless it was by his direction I signed it and issued a waiver of jurisdiction. Q. Well, was it at his direction, then, that you signed this? A. At Judge Church's oral direction, right. I wouldn't consider signing one without it. * * * Q. Did you consider you actually had such authority to issue such an order over your signature before you were Court Commissioner? A. Only by the oral orders of Judge Church, not myself. I didn't have that authority by the fact that I

> was a probation officer, but Judge Church, I felt, had authority to give me an order, and when he gave me an order I carried it out.

On October 3, 1962, the prosecuting attorney (William J. Daly) filed an information charging petitioner with the crime of burglary in the second degree, committed as follows:

> That on or about the 12th day of September, 1962, in the County of Jefferson, State of Washington, the said defendant, Byrle Laird Dillenburg, with intent to commit some crime therein, did, willfully, unlawfully and feloniously break and enter the dwellinghouse of one William Ellard, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Washington.

Thereafter, the matter of petitioner's plea to this information and the sentence to be imposed was before the superior court six times as shown in the appendix.

The crucial question before us is whether a boy 16 years and 2 months old who has been arrested on the charge of having committed a crime may be turned over to the proper officers for trial in the superior court as an adult under the provisions of the criminal code upon an order signed by the chief probation officer at the oral direction of the juvenile court judge.

The statutory provisions relating to the constitution and operation of the juvenile court are found in RCW 13.04.030. The powers and duties

of probation counselors are set forth in RCW 13.04-.040, which provides that they shall make such investigations of the antecedents, character, family history, environments, and cause of the dependency or delinquency of every child brought before the juvenile court as may be required by the court. They are required to make a written report thereof to the juvenile court judge. These counselors are given all the powers conferred on sheriffs and police officers to make arrests for violations of state laws or ordinances relating to the care, custody, and control of delinquent or dependent children. They are given the duty of taking charge of the child before and after trial in such manner as the juvenile court shall direct.

After providing for the initiation and conducting of hearings before the juvenile court, RCW 13-.04.120 specifically deals with the procedure required after a child under 18 years of age has been arrested for alleged criminal activity. This section provides as follows:

> When, in any county where a juvenile court is held, a child under the age of eighteen years is taken into custody by a parole, peace, police or probation officer, such child shall be taken directly before such court, or placed in the detention home or place under the jurisdiction of such court, or into the custody of the court probation officer: *Provided*, That if the parent, guardian, custodian or a responsible relative of the child furnishes the officer a signed statement agreeing to produce the child at the next

juvenile court session, the child may be released to the signer of the statement. Any such signer who fails, without just cause shown to the court, to produce such child as agreed, shall be guilty of contempt of court and may be punished accordingly.

The court may proceed to hear and dispose of the case in the same manner as if the child had been brought before the court upon petition as hereinbefore provided. In any such case, the court shall require notice to be given and investigation to be made as in other cases under this chapter, and may adjourn the hearing from time to time for such purpose. Pending final disposition of the case the court may make such disposition of the custody of the child as it shall deem for the best welfare of the child. If, upon investigation, it shall appear that a child has been arrested upon the charge of having committed a crime, *the court, in its discretion, may order such child to be turned over to the proper officers for trial under the provisions of the criminal code.*

Nothing in this section shall be construed as forbidding any peace officer, police officer or probation officer from immediately taking into custody, without process, any child who is found violating any law or ordinance, or who is reasonably believed to be a fugitive from his parents or from justice, or whose surroundings are such as to endanger his health, morals or welfare, unless immediate action is taken. In every such case, the officer taking the child into custody shall immediately report the fact to the juvenile court and the case shall then be pro-

> ceeded with as provided in this chapter: *Provided*, That whenever a child is arrested for a violation of any law, including municipal ordinances, regulating the operation of vehicles on the public highways, a copy of the traffic citation and a record of the action taken by the juvenile court shall be forwarded by the court to the director of licenses in the same manner as provided in RCW 46.20.280. (Italics ours.)

The circumstances under which the order involved in this case was signed by the chief probation officer are stated in his testimony which is quoted above.

In the trial court's oral opinion in the present proceeding the court's reasons for upholding the validity of the chief probation officer's order were stated as follows:

> I think perhaps I will first discuss this transfer of jurisdiction of a juvenile to the Superior Court. It's given me a lot of concern. It is in the file. It has to be determined. Turning first to the section of the statute Mr. Murphy mentioned, it is quite clear in the beginning of this juvenile law, many years ago, it was provided that in counties in which there is no resident judge, the Court Commissioner shall have power and authority concurrent with the Superior Court and the judge thereof to hear all matters, relating to juveniles. Now, this specifically provided that a court commissioner has the right to enter any order or judgment. * * *

The court then discussed the statutory powers of a court commissioner. See RCW 13.04.030 and

.040. Several months after the signing of the order here in question, the chief probation officer, on November 30, 1962, was appointed as court commissioner. However, his powers and duties in that capacity have no direct bearing on the question to be decided by this court.

The oral opinion then continued as follows:

> I have read RCW 13.04.120 many times, and this morning I thought it was more worry then I feel now, because of the wording of the statute. It says, if upon investigation it shall appear that a child has been arrested upon the charge of having committed a crime the court in its discretion may order such child to be turned over to the proper officers for trial under the provisions of the criminal code. The question is, does the statute indicate that it is necessary that a court enter a written order in order to direct the prosecution under the criminal code of a child who has committed a crime. I can't think it does. I think the court in its discretion may so order, orally. Judge Church did, here. At the time of the arraignment he said, "I will state this to you and both counsel." Now, that meant you, Mr. Dillenburg, and to both counsel, meaning your counsel and the prosecuting attorney. "I thought this was a situation where a juvenile aspect should not be given, because I wanted this boy to be under a stricter and better and more effective and comprehensive probation than could be effected in the juvenile aspect of it. * * *

We are not in agreement with the views expressed by the trial court at the habeas corpus hear-

ing. Although there is no doubt that Judge Church, as juvenile court judge, was familiar with the petitioner's criminal record as a juvenile offender and orally exercised his discretion, he (1) failed to give petitioner a juvenile court hearing as to whether he should be tried as an adult, and (2) failed to enter an order carrying out the result of his decision.

The matter of the trial of a juvenile under 18 years of age as an adult in the superior court on a felony charge is not a case over which that court has original jurisdiction. The Superior Court as such has no jurisdiction to try such juvenile offender on a felony charge unless and until the conditions precedent prescribed in RCW 13.04.120 (quoted above) have been complied with. The record of this compliance with the statute must appear officially in the record of the superior court which later tries the juvenile offender. An oral or memorandum opinion of a trial court is not a substitute for the final order or judgment. It is no more than the trial court's verbal expression of his informal opinion at that time. It has no final or binding effect unless formally incorporated into a written order signed by the court. See *Ferree v. Doric Co.*, 62 Wn.2d 561, 383 P.2d 900 (1963), and cases cited therein.

If the rule is applicable in those civil cases which define a final judgment, it should be equally applicable in the instance of a criminal trial of a juvenile where the superior court's jurisdiction depends on the official order of the juvenile court entered in the

record. Until that written order is entered, the superior court has no jurisdiction.

A court may give oral orders in certain circumstances in the conduct of a trial over which it has jurisdiction. However, when the object of the order is to surrender jurisdiction and to create jurisdiction of the case in another state court, we are of the opinion that the order must be in writing. This is particularly true since the order must appear in the record of the trial court in order to establish that the trial court had jurisdiction to hear the case. See *State v. Hager*, 157 Wash. 664, 290 Pac. 230 (1930).

Generally speaking, the orders of the juvenile court are reviewable by this court upon petition for a writ of certiorari. *Wade v. State*, 39 Wn.2d 744, 238 P.2d 914 (1951). Had petitioner sought a review of the order signed by the chief probation officer, we could not have passed on the merits (the issue of whether the trial court had properly exercised discretion) because it was not signed by a juvenile court judge or even by a court commissioner. There was only an oral order. See *Fairview Lumber Co. v. Makos*, 44 Wn.2d 131, 265 P.2d 837 (1954), and *Strickland v. Rainier Golf & Country Club*, 156 Wash. 640, 287 Pac. 900 (1930).

In *State v. Ring*, 54 Wn.2d 250, 339 P.2d 461 (1959), the defendant was under 18 years of age when the crime was committed but had reached his 18th birthday prior to the time of trial. We held that the superior court had jurisdiction to try him as an adult, saying, at p. 253:

At the time of his arrest, Harold M. Ring was under eighteen years of age. Shortly thereafter, the juvenile department of the Stevens county superior court purported to transfer "the case against said minor" to the superior court, pursuant to RCW 13.04.120. A second amended information, which included Harold M. Ring, was then filed.

The case went to trial on this information, at which time Harold M. Ring was eighteen years of age. It now appears that the copy of the order of the juvenile court, filed *in this proceeding*, was not properly authenticated; hence, defendant Harold M. Ring now contends that the superior court did not acquire jurisdiction over him. This argument is made for the first time in this court; it was not urged in the trial court.

The superior court has original jurisdiction "in all criminal cases amounting to felony." Art. IV. § 6, Washington constitution. The juvenile court act recognizes that the superior court has original jurisdiction "in all cases coming within the terms of this chapter." RCW 13.04.030.

RCW 13.04.120 provides that the juvenile court (really the superior court or a department thereof) "may proceed to hear and dispose of the case" against a child under eighteen years of age. This may be a *bar* to proceeding against him in the superior court while he is under eighteen, unless the juvenile court orders "such child to be turned over * * * for trial under the provisions of the criminal code," "but

it does not deprive the superior court of jurisdiction after he reaches eighteen years of age.

Our conclusion that defendant's contention is without merit is dictated by the *rationale of State v. Melvin*, 144 Wash. 687, 689, 258 Pac. 589 (1927), wherein this court said:

> "We think it follows, therefore, that the law which provides for protection and reformation or punishment within the discretion of the court, in the case of a delinquent minor proceeded against before he arrives at the age of eighteen years, constitutes no bar to a criminal action brought against him, after he becomes eighteen years of age, for an act committed prior to that age."

The fact that Harold M. Ring was under eighteen years of age when the second amended information was filed is of no moment. He was eighteen when the case was tried. This conclusion is in accord with the majority rule discussed in the annotation, "Age of child at time of alleged offense or delinquency, or at time legal proceedings are commenced, as criterion of jurisdiction of juvenile court," appearing in 123 A.L.R. 446.

In the case just cited, the juvenile court order was not properly authenticated. Therefore, if the defendant in that case had not become 18 years of age before he was tried, the inference is that the superior court could not have tried him as an adult.

The only authority given by the juvenile court law to anyone to function as a judge is limited by

the legislature to court commissioners in certain circumstances. See RCW 13.04.030 and RCW 2.24-.040. Under the conditions described therein, the commissioner is vested with concurrent jurisdiction with the superior court judge to perform the functions of a juvenile court judge.

If the legislature had intended to authorize probation officers to execute court orders in lieu of, or at the direction of, a juvenile court, it would have so provided by definite language in the act.

Furthermore, RCW 13.04.120 entitles the juvenile to a hearing before final disposition of his case can be made by the juvenile court. The investigations provided for in that section are not a substitute for but rather an aid to a hearing.

This procedure includes, essentially, proper notice and the right to appear in a hearing before a juvenile court judge. See RCW 13.04.120 (quoted above) and RCW 13.04.070. The fact that the petitioner here had been before the juvenile court several times because of serious offenses and had a bad criminal record does not warrant the court's dispensing with a hearing on the question of whether he should be tried as an adult. The juvenile court judge must, before entering an order, exercise his discretion after affording the juvenile an opportunity to be heard as to whether he should be tried as a juvenile or as an adult. "In any such case, the court shall require notice to be given and investigation to be made as in other cases under this chapter, and may

adjourn the hearing from time to time for such purpose." The sentence just quoted requires a hearing, as well as an investigation, in all instances before an order is issued making final disposition of the child's custody within the jurisdiction of the juvenile court. It seems obvious to us that the "Surrender of Jurisdiction" signed by the probation officer in this case is such a "final disposition" in that it purports to divest the juvenile court of jurisdiction and to vest jurisdiction in the superior court. Therefore, a hearing is required.

The attorney general in his supplemental brief, in support of the trial court's dismissal of petitioner's petition, cities *United States v. Stevenson*, 170 F. Supp. 315 (1959), which he contends involves an act of Congress relating to the District of Columbia which is similar to the above-quoted portion of RCW 13.04.120. The district court in that case pointed out that the act of Congress did not require that a quasi-judicial or judicial hearing be conducted by the judge before making the waiver of jurisdiction and that the "full investigation" can be conducted on an ex parte basis.

The recent opinion of the United States Supreme Court (filed March 21, 1966) concerning the District of Columbia statute relating to the juvenile court is a complete answer to the *Stevenson* case, *supra*, and the Attorney General's argument that only an investigation is needed. In *Kent v. United States*, ... U.S. ....., ... L.Ed.2d ....., ... Sup. Ct. ..... (1966), the

juvenile court judge surrendered the jurisdiction of the juvenile court after a "full investigation" but without holding any hearing. He made no findings and gave no reason for the waiver. Petitioner Kent had a substantial prior juvenile court record. In holding that the juvenile court had denied to petitioner Kent the basic requirements of due process under the District of Columbia Juvenile Court Act, the United States Supreme Court, in the majority opinion, states:

> We agree that the order of the Juvenile Court waiving its jurisdiction and transferring petition for trial in the United States District Court for the District of Columbia was invalid. There is no question that the order is reviewable on motion to dismiss the indictment in the District Court, as specified by the Court of Appeals in this case, *Kent v. Reid, supra*, (316 F.2d 331 (D.C. Cir. 1963)). The issue is the standards to be applied upon such review.
>
> We agree with the Court of Appeals that the statute contemplates that the Juvenile Court should have considerable latitude within which to determine whether it should retain jurisdiction over a child or—subject to the statutory delimitation—should waive jurisdiction. But this latitude is not complete. At the outset, it assumes procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness, as well as compliance with the statutory requirement of a "full investigation." *Green v. United States*, 308 F.2d 303 (C.A.D.C. Cir. 1962). The statute gives the Juvenile Court a substantial

degree of discretion as to the factual considerations to be considered, the weight to be given them and the conclusion to be reached. It does not confer upon the Juvenile Court a license for arbitrary procedure. The statute does not permit the Juvenile Court to determine in isolation and without the participation or any representation of the child the "critically important" question whether a child will be deprived of the special protections and provisions of the Juvenile Court Act. It does not authorize the Juvenile Court, in total disregard of a motion for hearing filed by counsel, and without any hearing or statement or reasons, to decide —as in this case—that the child will be taken from the Receiving Home for Children and transferred to jail along with adults; and that he will be exposed to the possibility of a death sentence instead of treatment for a maximum, in Kent's case, of five years, until he is 21.

We do not consider whether, on the merits, Kent should have been transferred; but there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons. It is inconceivable that a court of justice dealing with adults, with respect to a similar issue, would proceed in this manner. It would be extraordinary if society's special concern for children, as reflected in the District of Columbia's Juvenile Court Act, permitted this procedure. We hold that it does not. (Footnotes omitted)

In our opinion, this decision is conclusive of the issue in this case of whether a judicial hearing is required by our statute in order to fulfill the procedural requirements of due process.

For the reasons stated herein, we must hold that the purported order entitled "Surrender of Jurisdiction" (quoted above) was null and void, and hence the superior court, in accepting petitioner's plea of guilty, and entering its judgment and sentence, was acting without legal authority.

We note that petitioner is now over 18 years of age and may be tried in the superior court as an adult upon the information referred to in the appendix hereto. *State v. Melvin*, 144 Wash. 687, 258 Pac. 859 (1927); *State v. Ring*, *supra*.

Accordingly, the judgment and sentence of the superior court denying petitioner's petition for habeas corpus is reversed with directions to enter an order directing respondent to forthwith transfer petitioner to the county jail of Jefferson County. Petitioner shall be promptly re-arraigned upon the information filed in cause No. C-575, and thereupon be otherwise dealt with according to law. If the state fails to take such action within 20 days after his arrival at the county jail, petitioner shall be released from custody.

It is so ordered.

DONWORTH, J.

We concur: ROSELLINI, C. J., WEAVER, J., BARNETT, J. Pro Tem., HAMILTON, J.

APPENDIX TO COURT OPINION

October 8, 1962 (Judge Eugene Wright presiding). The prosecutor advised the court that petitioner had a previous criminal history. Mr. A. Clemens Grady appointed as counsel for petitioner and bail fixed at $2,000.[2]

October 15, 1962 (Judge Church presiding). Petitioner's counsel appeared with the prosecuting attorney and advised the court that they were expecting to receive information from the Fort Worden Diagnostic Center concerning the behavior and disciplining problem which petitioner presented when he was confined there under the order of the juvenile court. Petitioner was not present in court on this occasion and nothing was done concerning his case.

October 22, 1962 (Judge Church presiding). Petitioner and his counsel were present for arraignment. The prosecuting attorney stated that the in-

[2]At this hearing the following statements (among others) were made by the court in petitioner's presence: "The Court: Normally the bail on this charge would be how much, Mr. Daly? Mr. Daly: We normally fix around $2,500. If the boy were an adult—The Court: The charge here is breaking and entering a dwelling house. Would you be able to post bail of $1,000, or $2,000? The defendant: I don't believe so."

Petitioner contended in this proceeding that because he was never furnished with a copy of the information he mistakenly pleaded guilty to the Discovery Bay burglary which was committed September 19, 1962, whereas he thought he was pleading guilty to the Brinnon burglary which was committed September 12, 1962, which did *not* involve breaking and entering a dwelling house. He claimed that he did not discover this error until June or July, 1964.

The court's statement quoted removes any factual basis for petitioner's contention. From his previous criminal experience as shown by his juvenile record, he knew that the Brinnon burglary involved the pilfering of an unoccupied summer camp. He must have known that no breaking and entering of a dwelling house was involved in that burglary. Hence there is no foundation for his alleged mistake in pleading guilty.

formation had been received from the Diagnostic Center and delivered to petitioner's counsel for inspection. His counsel stated that he had not had time to read it. A continuance was granted by the court.

October 29, 1962 (Judge Church presiding). Petitioner's counsel stated: "In regard to that matter, your Honor, I am quite sure we are going to enter a plea of guilty. I am quite sure no interest of the defendant will be jeopardized by continuing it another week." The prosecuting attorney stated that he had no objection and the court granted a further continuance of one week. Petitioner was not present.

November 5, 1962 (Judge Church presiding). Petitioner and his counsel were present for arraignment. The prosecuting attorney (Mr. Daly) stated that they were present for arraignment. The following proceedings then took place:

The Court: Is this man ready to plead, Mr. Grady?

Mr. Grady: Yes, your Honor, the defendant is ready.

The Court: Come forward, please. You are represented by Mr. Grady as your attorney, are you?

The Defendant: Yes.

The Court: Have you discussed this matter with him?

The Defendant: Yes.

The Court: Thoroughly, so that you understand all the aspects of risk and hazards there may be in this, if you plead guilty?

The Defendant: Yes.

The Court: Is he ready to plead, Mr. Grady?

Mr. Grady: Yes, he is.

The Court: How do you plead to this charge in the Information, wherein it is alleged that you are guilty of the crime of burglary in the second degree—guilty or not guilty?

The Defendant: Guilty.

The Court: What disposition do you suggest in this matter, Mr. Daly?

* * *

* * * But I think, your Honor, let's refer this to the probation officer.

The Court: I think we should. Frankly, I will state this to you and both counsel, I thought this was a situation where a juvenile aspect should not be given, because I wanted this boy to be under a stricter and better and more effective and comprehensive probation than could be effected in the juvenile aspect of it. It is not at all satisfactory. It is good enough, but there isn't enough of it. We are exceedingly fortunate to have a senior parole officer assigned to this area here. * * *

Mr. Daly: I understand the matter will be referred for pre-sentence investigation and report?

The Court: Yes, sir.

December 17, 1962 (Judge Church presiding). Petitioner, his counsel, and the prosecuting attorney were present for the imposition of sentence. The following proceedings were then had:

> Mr. Daly: If the Court will examine the file it will disclose to him that during your Honor's absence the defendant was examined by Judge Wright. He was then and there advised of his constitutional and statutory rights. Inquiry was made as to his financial ability, whereupon Judge Wright being satisfied that the man was without funds, Mr. A. C. Grady, a member of the Bar of this county, was appointed to represent the defendant. On November 5 the matter came on for arraignment before your Honor, at which time your Honor reiterated the statements made by Judge Wright as respecting his constitutional rights. He was then present and represented by his counsel, Mr. Grady, whereupon he entered his plea of guilty to the charge contained in the Information. Thereafter your Honor indicated that this was a matter that should be properly referred to the probation officer for a pre-sentence investigation and report. That incident occurred during the transition and change of probation officers in the Clallam and Jefferson Counties, and then the matter was then referred to Mr. Rarity, our present probation officer; my information is now that Mr. Rarity has filed his report and recommendations in the premises. He has also communicated his recommendations and findings to Mr. Grady. The matter is up now for sentence.

The Court: Mr. Grady?

Mr. Grady: If the Court please, I assume that having read the report of the probation officer, there is very little I could add. The defendant in this case, strangely enough, although having had many opportunities to use intoxicating liquor, has not done so, and I think that perhaps shows a resentment to the home condition. He was born July 6, 1946, he is quite young, and it has been my hope all the time we might possibly obtain a deferred sentence for the defendant. I realize now the more recent reports are not too favorable. I don't know what more anyone can do. I know the history very well. The probation officer feels that if he could become professional in some kind of a trade and get interested in something like that, he might have some hope for his future.

The Court: Is the defendant here?

Mr. Daly: Yes, your Honor. Come forward.

The Court: This young man has hitherto pled, has he not, Mr. Grady?

Mr. Grady: Yes, he has entered a plea.

The Court: I have the benefit of an intelligent and exhaustive analysis of this problem from Mr. Rarity. I read it carefully before I came in this morning. It is not necessary to go through the whole record on this. However, I will briefly outline the background. He was under the supervision or at least referred to the Juvenile Court in September 1959 in connection with the stealing of certain coins. January 1960 there was an incident of an auto-

> mobile theft. The same month there was a burglarious entering of a residence. He was at Luther Burbank for a time, his adjustment there seems to have been less than satisfactory. It is the judgment of this Court that this defendant Byrd (sic) Laird Dillenburg is guilty of the crime charged and alleged in the Information upon his plea of guilty, and that he be sentenced to the State Reformatory at Monroe, Washington, for a period not to exceed fifteen years. I want to take the time to say something about this to the young man who is going to experience the confinement at Monroe. It is one of the outstanding institutions in the United States. It is in charge of one of the outstanding penologists, a man whom the institution is exceedingly fortunate to be able to prevail on him to take over the management and direction of the state reformatory. There are opportunities there that can be found nowhere else. In this state certainly, and scarcely in any other state.

Judgment and sentence was duly entered on December 17, 1962, pursuant to the oral pronouncement by Judge Church and a warrant of commitment was issued in accordance therewith.

It is to be noted that Judge Church retired as Judge of the Superior Court of Clallam and Jefferson Counties on August 31, 1963, and died prior to the hearing of the present habeas corpus proceeding.

IN THE SUPREME COURT
of the
STATE OF WASHINGTON

In the Matter of the Application for a Writ of Habeas Corpus of BYRLE L. DILLENBURG, *Petitioner*, v. ROGER F. MAXWELL, Superintendent of the Washington State Reformatory at Monroe, Washington, *Respondent*.	No. 38273

STATE OF WASHINGTON,
COUNTY OF THURSTON, } §

I, WILLIAM M. LOWRY, Clerk of the Supreme Court of the State of Washington, do hereby certify that the attached and foregoing is a full, true and correct copy of the Opinion in the above case and the whole thereof, as the same was filed in the above entitled case on the 28th day of April, 1966, and now appears of record and on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 13th day of May, 1966.

WILLIAM M. LOWRY,
Clerk of the Supreme Court,
State of Washington.

APPENDIX B.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Application for a Writ of Habeas Corpus of ROBERT A. MILLER, *Petitioner*, v. B. J. RHAY, as Superintendent of the Washington State Penitentiary at Walla Walla, Washington, *Respondent*.	No. 38216 ORDER DENYING APPLICATION FOR WRIT OF HABEAS CORPUS

This matter came on regularly for hearing before Department No. II of this Court on June 11, 1965; the petitioner, ROBERT A. MILLER, acting pro se and the respondent being represented by STEPHEN C. WAY, Assistant Attorney General; and the court having read and considered the application of ROBERT A. MILLER for a writ of habeas corpus, and the respondent's return and answer and the attachments thereto, and it appearing that the application for a writ of habeas corpus and the return and answer, give rise to the following:

ISSUES

1. Whether or not the Superior Court of the State of Washington for King County acquired jurisdiction over the person of the petitioner upon the charge of TAKING A MOTOR VEHICLE WITHOUT THE PERMISSION OF THE OWNER as contained in the

Information, at such time the petitioner being 16 years of age.

2. Whether or not the petitioner was unlawfully held in custody and confinement in the King County Jail from the time of his arrest on December 6, 1957, until the entry of judgment and sentence during all of which time the petitioner was a minor of the age of 16 years.
3. Whether or not the petitioner was unlawfully fingerprinted and photographed while held in custody in the King County Jail.

This court having considered the application of ROBERT A. MILLER for a writ of habeas corpus; the return and answer of the respondent and the attachments thereto, the memorandum of the petitioner in support of his application for a writ of habeas corpus and the memorandum brief of the respondent, and having heard the oral argument by counsel for the respondent, STEPHEN C. WAY, Assistant Attorney General, and the court being fully advised in the premises, makes the following:

CONCLUSIONS

1. That on December 9, 1957, the Juvenile Department of the Superior Court of the State of Washington for King County entered an Order in Cause No. 25936 in accordance with the provisions of RCW 13.04.120 refusing to entertain jurisdiction of the petitioner and remanding him to the prosecuting attorney of King County for the taking of such action under the

criminal laws of the State of Washington as he might deem to be appropriate; and such order further authorizing the holding of the petitioner in confinement in the city jail of Seattle, or the county jail of King County, and authorizing the taking of photographs and fingerprints of the petitioner. That at the time of the entry of such order refusing jurisdiction by the juvenile court, the criminal department of the Superior Court of the State of Washington for King County acquired jurisdiction of the person of the petitioner and any and all defects in the nature of the custody of the petitioner, and the taking of his photograph and fingerprints, were cured by the entry of such order by the juvenile court refusing jurisdiction.

IT IS HEREBY ORDERED that the application of ROBERT A. MILLER for a writ of habeas corpus be, and the same is hereby denied and the proceedings dismissed.

Done in the Chambers of the Chief Justice this 16th day of June 1965.

/s/ HUGH ROSELLINI
Chief Justice